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No. 753

In the Supreme Court of the United States

OCTOBER TERM, 1964

KIT MANUFACTURING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*):	
Section 8(a)(1)	2, 3, 6, 7, 8
Section 8(a)(3)	7, 8
Section 8(a)(5)	2, 3, 6, 7

759-916—65——1

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OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 11–17) is reported at 335 F. 2d 166. The Board's decision and order (R. 80–85)[1] are reported at 142 NLRB 957.

JURISDICTION

The decision of the court of appeals was rendered on August 5, 1964; a petition for rehearing was denied on September 15, 1964; and a decree was entered on September 18, 1964 (R. 73, 79, 80). The petition

[1] "R." refers to Volume I, and "Tr." refers to Volume II, of the Transcript of Record filed with this court.

for a writ of certiorari was filed on December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the company violated Sections 8(a) (5) and (1) of the National Labor Relations Act by refusing to bargain in good faith with the Union, and Sections 8(a) (3) and (1) of the Act by refusing reinstatement to an employee who struck in protest against the unfair labor practices.

STATUTE INVOLVED

The relevant statutory provisions are set forth in Appendix A to the petition.

STATEMENT

1. *Background.*—On March 31, 1961, the Board certified Local Union 213, Street Metal Workers International Association, AFL–CIO, as the bargaining representative of petitioner's production and maintenance employees. Petitioner and the Union reached an impasse in contract negotiations on September 27, 1961, over the Union's demands for union security provisions and wage increases.[2] On March 13, 1962, the Union requested further negotiations noting improved conditions in the industry and its progress in organizing the industry. The Company

[2] The Union filed charges in December 1961 alleging that petitioner, by the above conduct, had refused to bargain in violation of Sections 8(a) (5) and (1) of the Act; these charges were dismissed by the Board's Regional Director on January 9, 1962. Board Case No. 19–CA–2341.

declined to bargain further on March 23, 1962, on the grounds that the parties had previously reached an impasse in negotiations, that the certification year was about to expire, and that the Union no longer represented a majority of the employees in the bargaining unit. In May 1962, pursuant to charges filed by the Union, the Board's General Counsel issued a complaint, alleging that, by its refusal to bargain in March, the Company had violated Sections 8(a) (5) and (1) of the Act (R. 23, 24; Board Case No. 19–CA-2406). On July 30, 1962, the Trial Examiner issued his report, sustaining the allegations of the complaint. The Trial Examiner's finding of a refusal to bargain on and after March 23 was affirmed by the Board, and the Board's order was enforced by the court below on August 12, 1963. 138 NLRB 1290, enforced, 319 F. 2d 857 (C.A. 9).

While the latter case was pending before the Board, petitioner engaged in the unfair labor practices which form the basis for the present case.

2. *The refusal to bargain in June 1962 and the ensuing strike.*—On June 15, 1962, petitioner, bypassing the Union, mailed the employees a proposed wage incentive plan. The employees showed no interest in the plan and petitioner dropped the matter (R. 25; Tr. 104).

On Thursday evening, June 28, the employees voted to strike on Monday, July 2, if petitioner persisted in its refusal to negotiate with the Union (R. 26; Tr. 16). That same evening, petitioner posted a notice announcing a 10-cent an hour wage increase, to become effective Monday morning (R. 26; Tr. 120–121, 241).

The next morning, Plant Manager Miles Reber warned the employees that strikers would be permanently replaced (R. 27; Tr. 146, 150). Reber also called the Union's business agent and asserted that the Company had no obligation to meet with the Union until it "received the results of the hearing" in the pending unfair labor practice case (R. 26; Tr. 14–15).

On July 2, 80 of petitioner's 108 employees struck in protest against petitioner's refusal to bargain with the Union. Petitioner rejected a Union request for a meeting during the first week of the strike, but met with the Union on July 18 pursuant to arrangements made by the Federal Mediation and Conciliation Service. Petitioner announced that it would "conciliate and not negotiate," and offered to reinstate 20 strikers and place the others on a preferential hiring list. The Union rejected this offer and the meeting ended without arrangements for a future meeting (R. 27; Tr. 26–27, 60, 193).

On August 3, after the Trial Examiner issued his report finding a refusal to bargain in the earlier case (*supra*, p. 3), the Union requested petitioner to reinstate the strikers on August 6 and to meet with it on that day. On August 6, petitioner told the strikers who appeared at the plant to come back on August 13. It also offered to recognize the Union and to reinstate 25 strikers, with preferential hiring for the other strikers, if the Union would "absolve" it of unfair labor practices. The Union rejected petitioner's offer and, on August 8, filed unfair labor practice charges against the Company. The next day, petitioner ad-

vised the Union that it would reinstate all the strikers on August 13, and offered to bargain with the Union upon five days' notice (R. 28–29).

The parties thereafter met on August 21, September 18, and October 1, 1962. At the August 21 meeting, Plant Manager Reber refused to discuss the Union's proposal for a maintenance-of-membership clause, allegedly because he did not know the meaning of such a clause and could not bargain on any form of union security without the permission of petitioner's top officials (R. 29; Tr. 195–196). He also refused to discuss wages on the ground that the unilateral wage increase granted on July 2 (*supra*, p. 3) foreclosed any further increase (R. 29; Tr. 44–45). He promised to send the Union wage data, which it had requested earlier that month (R. 29; Tr. 196–197).

Before the next meeting on September 18, petitioner offered, as its contract proposal, the contract rejected by the Union a year before. At the September 18 meeting, the Union submitted a proposed contract, but it was only briefly discussed because petitioner said it wanted to study the proposal at its "leisure" and come back with a counterproposal (R. 29–30; Tr. 200).

At the October 1 meeting, petitioner insisted that its contract proposal of September 1961 be submitted to the employees even though it was unacceptable to the Union representatives (R. 30; Tr. 204). The Union submitted the proposal to the employees, who unanimously rejected it (R. 30).

3. *The refusal to reinstate striker Charles Tveidt.*— Charles Tveidt was one of the employees who went

out on strike on July 2, in protest against the Company's unfair labor practices (R. 31; Tr. 170). Tveidt and four other strikers applied for reinstatement on the morning of July 23 and were put back to work by Plant Manager Reber (R. 34; Tr. 170–171). During the morning, some employees laughed at Tveidt and made remarks which he could not make out. Tveidt had lunch with the other returning strikers and mentioned what had happened to him that morning. Tveidt and two others—Egan and Post—decided not to return to work and left the plant without punching out their timecards or informing any supervisor of their decision. Tveidt rejoined the strikers and was seen by Reber back on the picket line either the next day or shortly thereafter (R. 35; Tr. 250). Although Reber had prepared a report on the afternoon of July 23, showing that Tveidt, Egan, and Post had been terminated for leaving the plant during working hours without permission, he rehired Egan when Egan reported for work the next morning (R. 35; Tr. 248). According to Reber, he would have reemployed Tveidt if he had reported that morning (R. 35; Tr. 248–249). Tveidt applied for reinstatement on August 13, as he and the others had been told to do on August 6 (*supra*, p. 4), but Reber refused his application on the ground that Tveidt had "walked back out" (R. 35; Tr. 174).

4. *The Board and court decisions.*—The Board found (R. 49), in agreement with the Trial Examiner, that petitioner violated Sections 8(a) (5) and (1) of the Act by refusing on and after June 15 to bargain in good faith with the Union. A Board majority also found (R. 50–51), contrary to the Trial Examiner (R. 35),

that petitioner violated Sections 8(a) (3) and (1) of the Act by refusing to reinstate Tveidt.[3] The Board ordered (R. 51–52) petitioner to cease and desist from the unfair labor practices found and from in any other manner infringing upon its employees' rights under the Act, to bargain with the Union, to reinstate Tveidt with back pay, and to post an appropriate notice.

The court of appeals affirmed the Board's findings and enforced its order in those respects (Appendix, *infra*, pp. 10–17).

ARGUMENT

1. Contrary to petitioner (Pet. 6–8), the court below did not find that petitioner violated Sections 8(a) (5) and (1) of the Act by refusing to make concessions on the Union's union-security demands. Rather, it affirmed the Board's finding that petitioner's entire course of conduct on and after June 15, 1962, manifested a refusal to bargain in good faith with the Union. An evidentiary ruling of this kind plainly does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, it is clear that there is ample support for the Board's finding, in view of petitioner's action in sending the employees (but not the Union) a proposed incentive plan, in unilaterally instituting a 10-cent an hour wage increase on the day the employees struck petitioner, in refusing to meet

[3] The Board further found that petitioner had violated the Act by encouraging an employee to circulate a petition to decertify the Union (R. 49, 31). The court below set aside this finding, and it is not at issue now.

with the Union until the Board ruled on the Union's charges against petitioner, and in requesting as a condition of negotiations that the Union withdraw its charges against petitioner (Appendix, *infra*, p. 12, n. 1).

2. Nor does petitioner's claim (Pet. 8–10) that Charles Tveidt was discharged for leaving work without permission on July 23, 1962, present any issue warranting review by this Court. The court below found, in agreement with the Board, that Tveidt left his job to rejoin the strike against petitioner's unlawful refusal to bargain and that thus, as an unfair labor practice striker, he was entitled to reinstatement when he reapplied for work along with the other strikers on August 6 (Appendix, *infra*, pp. 16–17). The court's ruling in this respect is clearly correct. *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 398, 404 (C.A. 2), certiorari denied, 347 U.S. 953; *Giustina Bros. Lumber Co.*, 116 NLRB 700, 735, enforced *sub nom. National Labor Relations Board* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371 (C.A. 9); cf. *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S. 9, 14–15.

Moreover, even assuming that Tveidt left his job without permission on July 23 for personal reasons, he was terminated a few days later, not for violating a plant rule against leaving work without permission, but because petitioner knew he had rejoined the strike. Since Tveidt's discharge "was thus in essential part on account of his participation in the strike" (Appendix, *infra*, p. 17), it violated Sections 8(a) (1) and (3) of the Act, even though other elements

entered into the Company's decision. *National Labor Relations Board* v. *Great Eastern Color Lithographic Corp.*, 309 F. 2d 352, 355 (C.A. 2), certiorari denied, 373 U.S. 950; *National Labor Relations Board* v. *Whitin Machine Works*, 204 F. 2d 883, 885 (C.A. 1); *Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. 2d 340, 348–349 (C.A. 8).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1965.

APPENDIX

United States Court of Appeals
For the Ninth Circuit

No. 18,940

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

KIT MANUFACTURING COMPANY, INC., RESPONDENT

[August 5, 1964]

On Petition for Enforcement of an Order of the National Labor Relations Board

Before CHAMBERS, MERRILL and DUNIWAY, *Circuit Judges*

MERRILL, *Circuit Judge:*

This case is before the court upon petition of the National Labor Relations Board, pursuant to § 10(e) of the National Labor Relations Act as amended, 29 U.S.C. § 160(e), for enforcement of its order issued against respondent company on June 7, 1963. The Board's decision and order are reported at 142 NLRB No. 107.

The charged unfair labor practices occurred at the respondent company's plant in Caldwell, Idaho, where the company manufactures trailers and mobile homes.

The Board found three violations. First, that the company had violated § 8(a) (5) and (1) of the Act, 29 U.S.C. § 158(a) (5), (1), by refusing to bargain collectively with the Union; second that the company had violated § 8(a)(1) of the Act by assisting and encouraging an employee in the circulation of a petition to decertify the Union; third that the company had violated § 8(a) (3) and (1) of the Act, 29 U.S.C. § 158(a) (3), (1), by its refusal to reinstate an employee who had participated in a strike against the company's unfair labor practices.

As to the first violation the Board adopted the findings and conclusions of the hearing examiner, based upon a lengthy recital of acts and conduct.[1] The hearing examiner concluded that "the company has, on and after June 15, 1962, failed and refused to bargain collectively with the Union, and thereby interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in § 7 of the Act, in violation of § 8(a)(5) and (1) thereof."

The company asserts that throughout it acted in good faith. Further, it seeks to justify its conduct in several ways.[2]

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[1] We see no need to set these forth in detail. They included sending to the employees (but not to the Union) on June 15, 1962, a proposed incentive plan; unilaterally instituting a 10-cent-an-hour wage increase on the day on which the employees struck the company; a refusal to negotiate until after the Board had handed down its decision on another charge of unfair labor practice against the company then pending before the Board; the company's request, as a condition to negotiation, that the Union withdraw its charges against the company.

[2] It contends that it had in good faith bargained to an impasse; that it had in good faith doubts that the Union could claim to represent the employees; that it could with propriety postpone negotiations until disposition of the charge of unfair labor practice, then pending before the Board.

These contentions were made before the hearing examiner, and are dealt with in his intermediate report. For the reason and upon the findings there set forth the conclusions of the hearing examiner that the company had not acted in good faith in its dealings with the Union cannot be overruled.

We conclude that as to this violation the order of the Board is entitled to enforcement.

As to the second violation, it appears that one Blair, an employee of the company, approached the plant manager for a pay raise on behalf of the employees and was told that no raise could be granted because it would bring forth unfair labor practice charges from the Union. Shortly thereafter Blair discussed the matter with other employees and later told the plant manager that he wished to circulate a petition to decertify the Union and asked for company permission. The plant manager refused permission. Blair then said he was going to do so anyway. The plant manager then stated that "there is nothing I can do to stop you from doing this; you're 21 years old and you know your own mind"; but that Blair had no permission to do so. Blair did circulate the petition during working hours. However, being advised that it was defective in form it was never formally presented.

The hearing examiner concluded that by failing to warn Blair that he could not solicit signatures during working hours without violating company rules, and by failing to discipline or reprimand him, the company had "aided and assisted Blair in the circulation of his petition," in violation of § 8(a)(1). The Board agreed with this conclusion.

In other words, the hearing examiner and the Board have both found that the company, by this failure to come actively to the defense of the Union, has inter-

fered with, restrained or coerced its employees in their rights to self-organization—the conduct proscribed by § 8(a)(1).

We cannot agree. There is no showing whatsoever of active company support, encouragement or cooperation. There is only a showing of a failure to forcibly prevent, obstruct or punish action taken by an employee entirely on his own initiative with knowledge that company permission was withheld and taken in accordance with the wishes not of the company but of himself and certain of his fellow employees. This, without more on the company's behalf, in our judgment cannot constitute company interference, restraint or coercion of its employees.

As to this asserted violation, the order will not be enforced.

The third violation has to do with one Tveidt, a company employee. The Board found that the company had discriminatorily discharged him in violation of § 8(a)(3) and (1) of the Act.

Tveidt had gone on strike with the other striking employees, but had then voluntarily returned to work. Subsequently, without giving the company notice, he had walked off the job and rejoined the picket line. When the strike terminated the other striking employees were reinstated. Tveidt was not.

The plant manager testified that Tveidt was discharged for violation of a company rule: failing to report for work after the lunch period without punching out or telling his foreman that he was leaving. If he left to engage in concerted action, however, the discharge would have been discriminatory, notwithstanding such violation. *Giustina Brothers Lumber Company,* 116 NLRB 700, 735, enforced sub nom. *NLRB* v. *Giustina Bros. Lbr. Co.* (9 Cir. 1958) 253 F. 2d 371, holds that a group of employees who ac-

cepted re-employment for a few days during a strike and then rejoined the strike were entitled to reinstatement, the same as the other strikers. In *NLRB* v. *Washington Aluminum Co.* (1962) 370 U.S. 9, the Supreme Court held that since the conduct of a group of employees in walking off their jobs in protest of cold working conditions was concerted activity protected under § 7 of the Act, discharging the employees for such conduct violated § 8(a)(1) even though the walkout violated a plant rule forbidding employees to leave their work without permission of the foreman. In *Home Beneficial Life Insurance Co.* v. *NLRB* (4 Cir. 1947) 159 F. 2d 280, it was held that an employer could not discharge its insurance agent employees for failing to report one morning to their respective offices before beginning their outside work, where such failure to report—even though a violation of a company rule—was the beginning of a strike by those employees.

In the instant case the hearing examiner, in his interim report, noted Tveidt's testimony that on the morning of the day he returned to work some of the employees laughed at him and made remarks the substance of which he did not overhear, and that during lunch he met with four other returning strikers. "Seemingly," continued the examiner, "Tveidt mentioned what had happened that morning and he, Egan and Post decided not to return to work at the end of the luncheon period." The examiner concluded:

> "Here the undisputed evidence shows that Tveidt left his employment for purely personal reasons, not because of any unfair labor practices on the part of the company or in furtherance of the objectives of the strike. Accordingly I find that irrespective of whether he voluntarily quit his employment or was termi-

> nated for leaving his job he was not thereafter entitled to reinstatement as a striking employee (*The W. T. Raleigh Company,* 90 NLRB, 1924-1927)."

The Board differed. In its order it stated:

> "The mere fact that he voluntarily went back to work for a few hours on July 23 does not imply that his dissatisfaction over the unfair labor practices ceased, especially when, only shortly thereafter, he rejoined the strike. Unlike the employee in *Rawleigh,* Tveidt knew the Respondent's unfair labor practices were continuing, and, irrespective of the immediate cause of his failure to return to work in the afternoon after lunch on July 23, his actions thereafter show that he left the job in order to associate himself actively with the strikers in protesting the unfair labor practices. For, by joining the picket line, Tveidt clearly evidenced his continuing interest in his employment and working conditions and his intent to resume his status as an unfair labor practice striker. Furthermore, the Respondent knew Tveidt was still on strike. Reber, having seen Tveidt on the picket line, should have known he had not quit and continued to have an interest in his employment, particularly since Reber was unaware of any other reason why Tveidt might have left the plant."

The Board appears to have inferred from the record that Tveidt's walkout was so closely related to the strike that it could not be cause for his discharge where, as here, neither the walkout nor any other conduct of Tveidt as a striker or picketer amounted to the serious strike misconduct which forfeits the striker's right to reinstatement.[3] We cannot

[3] See *NLRB* v. *Industrial Cotton Mills* (4 Cir. 1953) 208 F. 2d 87. Compare *NLRB* v. *Fansteel Metallurgical Corp.* (1939) 306 U.S. 240; and *NLRB* v. *Kelco Corp.* (4 Cir. 1949) 178 F.

say that this inference was unreasonable or unsupported by substantial evidence.

Moreover, the result would be the same even if, as found by the examiner, Tveidt's walkout was not initially related to the strike but was motivated solely by other, personal reasons, with the result that, being not part of protected activity but merely a violation of a company rule, it would have been ground for Tveidt's immediate discharge. See *NLRB* v. *Industrial Cotton Mills* (4 Cir. 1953) 208 F. 2d 87; *Home Beneficial Life Insurance Co.* v. *NLRB, supra*; *cf. Hamilton* v. *N.L.R.B.* (6 Cir. 1947) 160 F. 2d 465, 469. Here the plant manager testified that when one of those who had walked off with Tveidt returned the next morning he was put back to work, and that Tveidt's job had been held open "for several days" before Tveidt's discharge was made final. Therefore it would appear clear that Tveidt was discharged not simply because of the walkoff but also because of his failure to return within "several days." Since he did rejoin the strike the day following his walkout, or shortly thereafter, the discharge was thus in essential part on account of his participation in the strike. It therefore was a violation of § 8(a)(1) and (3).

The Board ordered the company to reinstate Tveidt and to reimburse him for any loss of pay he may have suffered by reason of the company's failure to reinstate him. The order in this respect is entitled to enforcement.

Decree will be entered enforcing the order as prayed as to the first and third violations specified and denying enforcement as to the second violation specified.

2d 578; with *NLRB* v. *Buitoni Foods Corp.* (3 Cir. 1962) 298 F. 2d 169, 174–175; and *NLRB* v. *J. Mitchko, Inc.* (3 Cir. 1960) 284 F. 2d 573, 576–577.

U. S. GOVERNMENT PRINTING OFFICE: 1965